

Patel (Migration) [2023] AATA 3889 (14 November 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Hitesh Vishnubhai Patel
CASE NUMBER:	1902035
HOME AFFAIRS REFERENCE(S):	BCC2016/2233782
MEMBER:	Namoi Dougall
DATE:	14 November 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 14 November 2023 at 2:52pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – validly married – sponsor living with mother during COVID pandemic and applicant returned to home country to take care of parents – no current contact or evidence of household, financial and social aspects of relationship – consent to decision without hearing – decision under review affirmed

LEGISLATION

*Migration Act 1958 (Cth), s 5F, 65
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 820.211(2)(a)*

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 29 June 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 because the delegate was not satisfied the evidence provided was sufficient to demonstrate the applicant was the spouse or de facto partner of the sponsor.
4. On 18 October 2023, the Tribunal wrote to the applicant advising that it had considered all the material before it relating to his application, but it was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing on 14 November 2023. On 3 November 2023, the applicant advised the Tribunal that he did not wish to give oral evidence and consented to the Tribunal proceeding to make a decision on the review without taking any further action to allow or enable him to appear before it. This matter has therefore been determined on the evidence available to the Tribunal.
5. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the applicant is a spouse, as defined by the Act, of Tanillia Hazel Townsend (the sponsor).
1. **The applicants' background and migration history**
7. The applicant was born in 1991 in India and is presently 31 years old. He has his parents and two siblings residing in India. The applicant is sponsored by Tanillia Hazel Townsend, an Australian citizen, born in 1993 and is presently 30 years old. She has her parents and one brother residing in Australia. The parties claimed in the visa application that they met on 18 February 2015 in Parramatta Park and made a commitment to a long term relationship on 24 December 2015.
8. The applicant first arrived in Australia on 22 May 2014 on a Subclass 573 visa granted on 10 May 2014. The Subclass 573 visa was valid until 30 August 2016. On 1 July 2016, 18 February 2019, the applicant was granted Bridging A visas, on 4 October 2019 the applicant was granted a Bridging visa B which was valid until 19 August 2021. The applicant travelled in and out of Australia on the Bridging B visa from 22 October 2019 to 23 November 2019. On the last day his Bridging B visa was valid, 19 August 2021, the applicant left Australia and has not returned.

9. In his statement provided to the Tribunal on 7 February 2023 (the February statement), the applicant set out how he met and married the sponsor and then stated as follows:
- During the COVID-19 Pandemic he left Australia on a Bridging A visa without applying for an exemption. Last year he applied for a Bridging B visa which unfortunately has expired.
 - Due to the COVID-19 pandemic, loss of job and shortage of money the sponsor decided to live with her mother, and he moved back to India to take care his parents.
 - He has lost contact with the sponsor.

Whether the parties are in a spouse or de facto relationship

10. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor, Ms Tanilla Townsend who is an Australian citizen.
11. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicants have filed a copy of their Marriage Certificate with the Tribunal which indicates they were married on 24 December 2015. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

13. The Tribunal considered the matters in reg 1.15A(3).
14. The Tribunal considered the financial aspects of the relationship including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
15. The parties provided evidence of a joint Westpac bank account statements from 29 April 2016 to 31 October 2017. The applicant provided the bank statements for his CBA bank account for the period 1 July 2021 to 30 December 2021. The applicant also provided his individual tax return for the tax year ending 30 June 2020 but not for

subsequent years, as stated in his email of 17 October 2023, because he had left Australia.

16. In the February 2023 statement the applicant stated that they had a joint account but before the COVID-19 Pandemic there was a misunderstanding between the parties and the sponsor closed the joint account. They shared accommodation with his friend, so the utilities and restaurant bills were paid by him, and the sponsor paid for the groceries. In his email of 17 October 2023. The applicant stated that he is stuck in his home country and the sponsor suffers from corona and is not in a good position to help him. The sponsor lives with her mother so there are no utility bills and they do not use credit cards. The sponsor works for cash and cannot provide any proof of income.
17. The applicant did provided information to the Department that indicated that the sponsor had been included in his will and as a beneficiary for has superannuation. The Tribunal was provided the annual statement for the tax year ending 30 June 2022 for his superannuation account which indicated that sponsor was still his nominated beneficiary. However, both of these can be changed easily by the applicant.
18. The applicant has provided no current evidence of the financial aspects relevant to the current status of his relationship with the sponsor with the exception of the superannuation annual report for the tax year ending 30 June 2022. There is no evidence before the Tribunal that the parties have joint ownership of any assets or joint liabilities. There is no evidence before the Tribunal that the parties pool their financial resources, provide assistance to each other through money transfers or share day-to-day household expenses. Further, the applicant stated in the February 2023 statement that the sponsor closed the joint bank account after a misunderstanding. There is no evidence before the Tribunal that the parties have any legal obligations or joint liabilities to each other.
19. The Tribunal is not satisfied the evidence of the financial aspects of the applicant and sponsors relationship supports that they have engaged in a genuine and ongoing spouse relationship.
20. The Tribunal considered the nature of the parties' household including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.
21. The applicant stated in the February 2023 statement that the parties shared accommodation with his friend but no evidence of this has been provided either to the Department or Tribunal. Further, the applicant also stated that he left Australia during the COVID-19 pandemic and has not returned and more importantly he also stated that he has lost contact with the sponsor.
22. Due to the lack of the evidence and that the parties have resided in different countries since the COVID-19 pandemic, the Tribunal is not satisfied that the claimed nature of the household of the applicant and sponsor is indicative they were a couple in a genuine spouse relationship at the time of application or at the time of this decision.
23. The Tribunal considered the social aspects of the relationship including whether they represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
24. The applicant provided the Tribunal with a statutory declaration dated 29 June 2016 from the applicant's neighbour in Westmead who has known the applicant for 12

months and had been introduced to the sponsor by the applicant 6 months earlier and sees her two to three times a week. Also provided to the Department and Tribunal were photos of the applicant and the sponsor together and together with others at social events including photos of their wedding. The Tribunal notes that the photographs are from 2015. The Tribunal was provided with three photos claimed to have been taken in 2017 but there is nothing in the photos to confirm the date and the photos are of the parties on their own. There is no evidence of social aspect of the parties' relationship after that time and particularly at the time of decision.

25. The Tribunal is not satisfied the social aspects of the applicant and sponsors relationship are indicative of a couple in a genuine spouse relationship at the time of application or at the time of this decision.
26. The Tribunal considered the applicant and sponsors commitment to each other including the duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
27. The parties claim to have known each other since February 2015 and married in December 2015.
28. Despite the claimed duration of their relationship there is little evidence before the Tribunal that demonstrates that the applicant and sponsor have a genuine commitment to each other. Nor is their evidence that even though they are living apart that this is not a permanent arrangement particularly in light of the applicant's concession that he has lost contact with the sponsor. Further, no evidence of the parties remaining in contact after the applicant left Australia in 2021 has been provided to the Tribunal.
29. The Tribunal is not satisfied that the evidence of the applicant and sponsors commitment to each other is indicative of a couple in a genuine spouse relationship.
30. Having considered the reg 1.15A(3) matters the Tribunal finds the applicant and the sponsor do not have a genuine and continuing relationship with each other.
31. On the basis of the above the Tribunal is not satisfied that the requirements of s 5F(2) are met at the time the visa application was made or the time of this decision.
32. Therefore, the applicant does not meet cl 820.211(2)(a) or cl 820.221.

DECISION

33. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Namoi Dougall
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).